A **LEMBAGA KEMAJUAN TANAH PERSEKUTUAN (FELDA) & ANOR**

v.

B **AWANG SOH MAMAT & ORS AND ANOTHER APPLICATION**

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
C GOPAL SRI RAM FCJ
[CIVIL APPLICATION NOS: 08-157-2009(D) & 08-158-2009(D)]
22 JANUARY 2010

D ***CIVIL PROCEDURE:*** *Judgment - Setting aside - Application for - Attempt to reopen concurrent exercise of discretion - Whether court to grant leave in such case - Whether there was a miscarriage of justice*

The applicants were the second and third defendants at first instance. The plaintiffs claimed that they had been cheated by the E defendants and claimed damages based on fraud in the tort of deceit. Neither counsel nor solicitors for the applicants appeared before the High Court on the morning of the trial. Since the applicants were absent, the evidence of the respondents' witnesses was correctly accepted by the learned judge who awarded the F plaintiffs substantial damages. The applicants applied to have the judgment set aside. The judge exercised discretion against the applicants and dismissed the application. An appeal to the Court of Appeal to have that exercise of discretion reviewed failed. Hence, the applicants before us sought leave on several questions which G they contended met the threshold that must be crossed by leave applications.

Held (dismissing the application for leave)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

H **(1)** This was an attempt to re-open the concurrent exercise of discretion. In accordance with its settled practice that was something this court would not do. A very strong case would have to be made out for court to grant leave in such case. Where, for example, it was demonstrated to a conviction that a I manifest injustice was visited upon the head of a litigant, this court may grant leave. But this was not such a case. The facts made that plain. (para 4)

(2) The applicants and their legal advisers were absent at the trial. The judge heard the evidence led by the respondents on the issue of liability and, acting in accordance with settled adjectival law, accepted it. The applicants' complaint of a failure of justice was therefore without any substance. (para 6)

(3) The applicants had two appeals before the Court of Appeal. One was against the refusal of the High Court to set aside judgment; the other was an appeal against the judgment on merits. According to the applicants, the Court of Appeal had dismissed this appeal without hearing argument on it. However, the applicants had canvassed all points relevant and material to the second appeal when arguing the first. So the fact that no further argument was heard on the second appeal occasioned no prejudice to the applicants. Neither had it, in the given circumstances, occasioned a miscarriage of justice. (para 7)

(4) The Court of Appeal had adjourned both appeals to consider their decision on the first appeal. After the Court of Appeal delivered its judgments on the first appeal on the adjourned date, it invited argument on the second. Counsel for the instant respondents was present; counsel for the applicants was absent. Further, all concerned were aware that the second appeal had been adjourned together with the first. It must have therefore been in the forefront of the mind of all counsel that the Court of Appeal would have to deal with the second appeal soon after the first had been disposed by judgment. To have assumed that only judgment in the first appeal would be delivered was not reasonable in the circumstances. The Court of Appeal when faced with the situation before it acted as any reasonable court of appeal would have. It rightly dismissed the second appeal. The applicants had only themselves to blame for this consequence. (para 7)

(5) There must be good grounds for postponing a trial or for setting aside a judgment obtained by reason of the absence of a party or its counsel at trial. That was not to say that a trial ought never to be postponed or that a judgment entered in the absence of a party ought never to be set aside. Each case depended on its own facts and what the judicial arbiter must always bear in mind was the justice of the particular case. (para 8)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Pemohon-pemohon adalah defendan kedua dan ketiga di dalam penghakiman instans pertama. Plaintif-plaintif mendakwa mereka telah ditipu oleh defendan-defendan dan menuntut gantirugi
B berdasarkan fraud dalam tort penipuan. Peguamcara bagi pihak pemohon-pemohon tidak menghadirkan diri di Mahkamah Tinggi pada pagi perbicaraan. Oleh sebab pemohon-pemohon gagal hadir, keterangan yang diberikan oleh saksi-saksi responden telah diterima oleh hakim yang mengawardkan gantirugi yang amat banyak.
C Pemohon-pemohon telah membuat permohonan supaya penghakiman diketepikan. Hakim telah melaksanakan budibicara terhadap pemohon-pemohon dan mengenepikan permohonan. Rayuan kepada Mahkamah Rayuan untuk memeriksa-balik perlaksanaan budibicara tersebut gagal. Oleh itu, pemohon-pemohon memohon kebenaran
D atas beberapa persoalan yang mereka hujah memenuhi puncak yang perlu di dalam permohonan kebenaran.

Diputuskan (mengenepikan permohonan kebenaran)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:
E

(1) Ini adalah percubaan untuk membuka balik perlaksanaan budibicara bersama yang sedemikian. Selaras dengan amalan yang dipakai, itu adalah sesuatu yang mahkamah ini tidak boleh benarkan. Untuk mahkamah membenarkan permohonan
F sedemikian, satu kes yang kukuh perlu diperbicarakan. Di mana, contohnya, ketidakadilan berlaku terhadap litigan, mahkamah boleh membenarkan kebenaran untuk merayu. Tetapi ini bukanlah kes sebegitu. Fakta-fakta telah membuktikannya.

G **(2)** Pemohon-pemohon dan penasihat undang-undang mereka tidak menghadirkan diri pada tarikh perbicaraan. Hakim telah mendengar keterangan yang diberi oleh responden-responden atas isu liabiliti dan, selaras dengan 'adjectival law' yang mantap, telah menerimanya. Aduan pemohon-pemohon
H mengenai kegagalan keadilan tidak mempunyai substans.

(3) Pemohon-pemohon mempunyai dua rayuan di hadapan Mahkamah Rayuan. Satu adalah terhadap keputusan Mahkamah Tinggi yang tidak membenarkan pengenepian penghakiman;
I yang lagi satu adalah rayuan terhadap penghakiman atas merit. Menurut pemohon-pemohon, Mahkamah Rayuan telah mengenepikan rayuan ini tanpa mendengar hujahan-hujahan.

Tetapi, pemohon-pemohon telah memberikan segala fakta-fakta yang relevan dan material kepada rayuan kedua apabila membuat penghujahan mengenai yang pertama. Oleh itu, fakta bahawa tiada hujahan dibicarakan atas rayuan kedua tidak memprejudiskan pemohon-pemohon. Ia juga tidak menimbulkan satu salah laksana keadilan.

(4) Mahkamah Rayuan telah menangguhkan kedua-dua rayuan bagi mempertimbangkan keputusan mereka atas rayuan pertama. Selepas Mahkamah Rayuan memberi penghakiman mengenai rayuan pertama pada tarikh yang ditanggung, ia meminta hujahan mengenai yang kedua. Peguam bagi pihak responden hadir; peguam bagi pihak pemohon-pemohon tidak hadir. Seterusnya, semua yang terlibat sedar bahawa rayuan kedua telah ditangguhkan bersama dengan yang pertama. Sudah tentu semua pihak sedar bahawa Mahkamah Rayuan akan cuba menyelesaikan rayuan kedua selepas rayuan pertama diberi penghakiman. Untuk membuat anggapan bahawa hanya penghakiman dalam rayuan pertama diberi tidak munasabah di dalam keadaan sedia ada. Mahkamah Rayuan apabila berhadapan dengan situasi sebegini telah bertindak dengan munasabah. Ia telah membuat keputusan yang betul apabila menolak rayuan kedua. Pemohon-pemohon hanya boleh menyalahkan diri mereka sendiri.

(5) Mesti terdapat alasan-alasan yang kukuh untuk menangguhkan perbicaraan atau mengenepikan penghakiman yang diperolehi kerana ketidakhadiran pihak yang terlibat atau peguamnya di perbicaraan. Ini bukanlah bermakna perbicaraan tidak boleh ditangguhkan atau penghakiman yang telah diberi atas alasan ketidakhadiran satu pihak tidak boleh diketepikan langsung. Setiap kes mestilah bersandarkan atas fakta-faktanya sendiri dan pengadil kehakiman mesti selalu memikirkan keadilan sesuatu kes.

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel [1948] 64 TLR 177 ***(refd)***

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

[Editor's note: For the Court of Appeal judgment, please see Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1.]

For the appellants - Dato' Cecil Abraham (Tunku Alina Alias, Sunil Abraham, Farah Suhadah Razali and Sara Anthony with him); M/s Wong Lu Peen & Tunku Alina

For the respondent - Yusfarizal Yusoff (Wan Rohimi Wan Daud, Muhd Azmi Talib & Asmadi Abu Bakar with him); M/s Wan Rohimi & Asmadi

Reported by Suhainah Wahiduddin

JUDGMENT

Gopal Sri Ram FCJ:

[1] We dismissed this application for leave and made the usual consequential orders. As we have said on previous occasions, this court does not give reasons for granting or refusing leave save in rare cases. This is such a case.

[2] The applicants before us seek leave on several questions which they contend meet the threshold that must be crossed by leave applications. But if you look at the questions carefully enough they are really alien to the fact pattern of this case. And the facts of this case have been thoroughly interrogated by both the majority and dissenting judgments in the Court of Appeal reported in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1. We are therefore spared the task of regurgitating them here. Suffice that we make broad and general reference to them.

[3] The applicants were the second and third defendants at first instance. The first defendant is since deceased. The plaintiffs who are settlers claimed that they had been cheated by the defendants. They claimed damages based on fraud, that is to say, in the tort of deceit. Such damages are usually substantial. The suit was therefore of much importance to both the applicants and the respondents. After the usual preliminary steps the suit was fixed for trial. There is material placed before us that shows that the applicants' solicitors were aware of the hearing date. In fact, solicitors for the respondents took the unusual but cautious step of writing to the applicants' solicitors reminding them of the trial date. Despite this, neither counsel nor solicitors for the applicants appeared before the High

Court on the morning of the trial. Counsel for the respondents were most fair. They had the matter stood down to 10.30am to enable the applicants and their counsel to appear. They would have telephoned the applicants' solicitors office but that would have been a wasted exercise as the trial was held on a Sunday - a working day in Kota Bharu but a public holiday in Kuala Lumpur where the applicants' solicitors' office was located. After waiting for a reasonable length of time the court convened. The absence of the applicants and their counsel was noted. The respondents then led evidence in support of their claim. Since the applicants were absent, the evidence of the respondents' witnesses was correctly accepted by the learned judge who awarded the plaintiffs substantial damages.

[4] The applicants came to know about this state of affairs soon after the court pronounced judgment. An application was made to have the judgment set aside. It failed. The judge had a discretion to exercise one way or the other. He had all the relevant material before him upon the issue. He was told that the failure to attend was occasioned by the negligence of the solicitor in the respondents' solicitors' firm who previously had conduct of the matter. He had failed to diarise the trial date. The judge exercised discretion against the applicants. He dismissed their application. An appeal to the Court of Appeal to have that exercise of discretion reviewed failed. So what we really had before us was an attempt to re-open the concurrent exercise of discretion. In accordance with its settled practice that is something that this court will not do. That is not to say that we will never do it. A very strong case will have to be made out for us to grant leave in such a case. Where, for example, it is demonstrated to a conviction that a manifest injustice was visited upon the head of a litigant, we may grant leave. But this is not such a case. The facts make that plain.

[5] Learned counsel for the applicants sought to argue that his clients were seriously prejudiced because the judge had acted upon an allegation of fraud that must be proved beyond a reasonable doubt. Also, the judge had made an award of damages which had never been proved. He referred us to the well known dictum of Lord Goddard LCJ in *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177 at p. 178 where he said:

> In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars and throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages'. He has to prove it.

A We were also referred to other cases where this principle was applied and damages reduced. See, for example, *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 FC. But if you look at those cases carefully enough, they were instances where the issues of liability and quantum were bitterly contested. This is not B such a case.

[6] Here, the applicants and their legal advisers were absent at the trial. The judge heard the evidence led by the respondents on the issue of liability and, acting in accordance with settled adjectival C law, accepted it. He also believed the evidence led in respect of quantum. He had no evidence going the other way on either issue. So you really cannot blame the judge for acting on the evidence before him. The applicants' complaint of a failure of justice is therefore without any substance. Of course, the award made by the D learned judge in this case does not constitute a precedent for future cases. It is strictly confined to the facts here. And those facts are that the applicants were absent so that there was no cross examination of the respondents' witnesses and no evidence led to contradict the material placed by the respondents before the court.

E **[7]** There is a further point made by the applicants that must be dealt with. The applicants had two appeals before the Court of Appeal. One was against the refusal of the High Court to set aside judgment which we have already discussed. The other was an appeal against the judgment on merits, that is to say, the judgment entered F by the judge at first instance after taking evidence from the respondents' witnesses. According to the applicants, the Court of Appeal dismissed this appeal without hearing argument on it. This, at first blush, is a serious complaint. It is contrary to procedural fairness for a court to adjudge an appeal against an appellant G without hearing arguments. However, there are two reasons why, on closer scrutiny there is really nothing in this ground of complaint. In the first place, we were advised by learned counsel for the respondents, and this appears quite clearly from the dissenting judgment, that the applicants had canvassed all those points relevant H and material to the second appeal when arguing the first. So the fact that no further argument was heard on the second appeal occasioned no prejudice to the applicants. Neither has it, in the given circumstances, occasioned a miscarriage of justice. The second reason is this. It transpires that after hearing full argument on the I first appeal, the Court of Appeal adjourned both appeals to consider their decision on the first appeal. After the Court of Appeal delivered its judgments on the first appeal on the adjourned date, it

invited argument on the second. Counsel for the instant respondents was present. However, senior counsel for the applicants was absent and his learned junior declined to make any submissions. The applicants' answer to this is that the matter was only fixed for delivery of judgment on the adjourned date and they could not reasonably have been expected to be ready to argue the second appeal. This, with respect, is as lame an excuse as you can find. All concerned were aware that the second appeal had been adjourned together with the first, no doubt the former for judgment. It must have therefore been in the forefront of the mind of all counsel that the Court of Appeal would have to deal with the second appeal soon after the first had been disposed by judgment. It was therefore reasonable for counsel to have been present and ready to make his submissions. To have assumed that only judgment in the first appeal would be delivered is not reasonable in the circumstances. The Court of Appeal when faced with the situation before it acted as any reasonable court of appeal would have. It rightly dismissed the second appeal. The applicants have only themselves to blame for this consequence.

[8] Before we conclude there is a matter to which we must allude. It is well known that courts at all levels are saddled with an enormous amount of work. Judicial arbiters are working very hard to clear the backlog. What we must aim for is a trial that takes place a few months and not several years after the commencement of the action. Counsel on all sides must cooperate to achieve this. Diligence in diarising dates is essential. We think it safe to say that gone are the days when the absence of a solicitor or counsel or a party on the hearing date will be looked upon with lenience. Quite the opposite. There must be good grounds for postponing a trial or for setting aside a judgement obtained by reason of the absence of a party or its counsel at trial. That is not to say that a trial ought never to be postponed or that a judgment entered in the absence of a party ought never to be set aside. Each case depends on its own facts and what the judicial arbiter must always bear in mind is the justice of the particular case. We cannot over emphasise that justice is too precious a commodity to be sacrificed at the altar of expediency.